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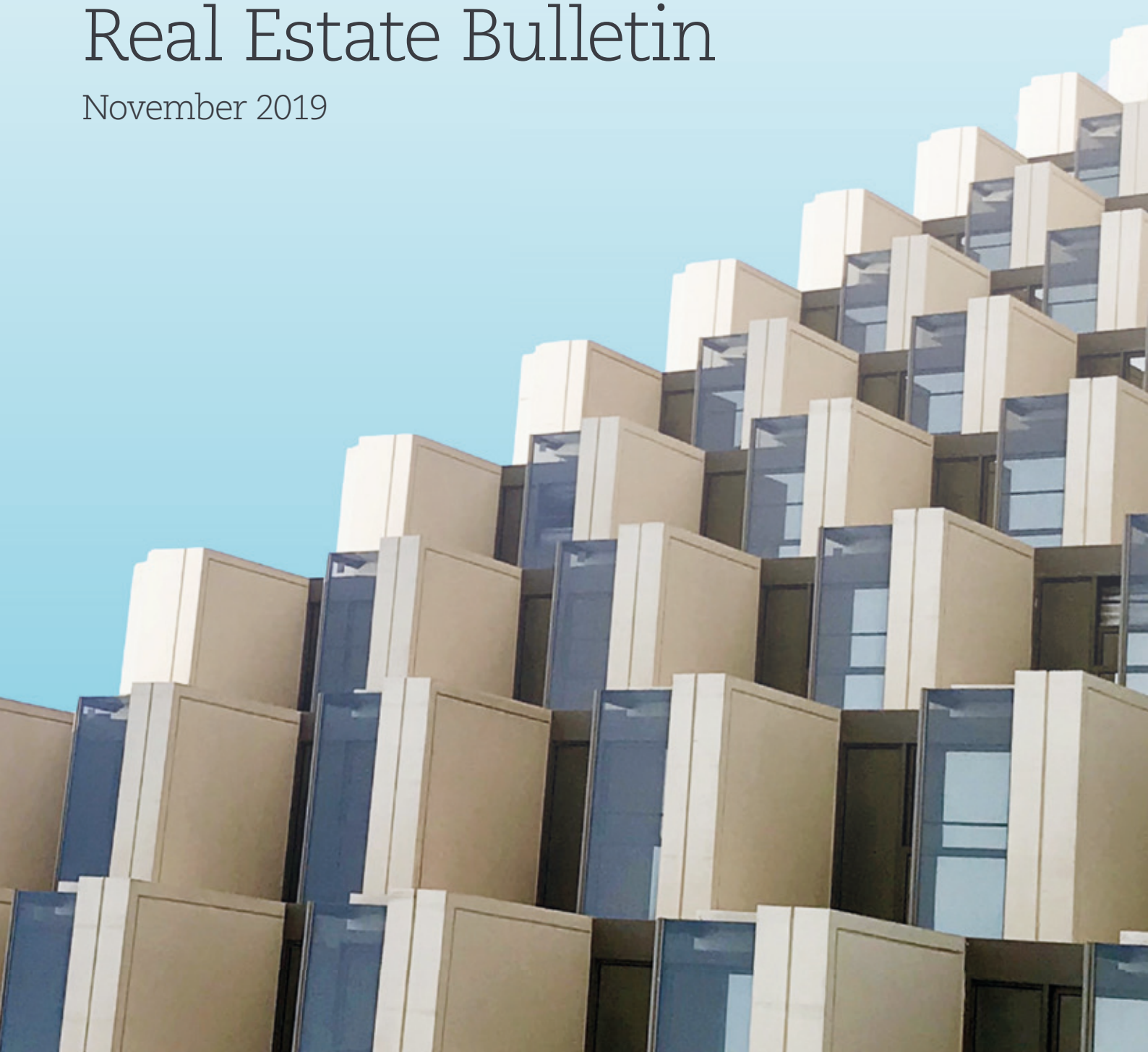
Real Estate Bulletin

November 2019



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Landlords prove unsuccessful in challenging Debenhams' CVA despite its somewhat draconian provisions

***Discovery (Northampton) Ltd & others v Debenhams Retail Ltd & others* [2019] EWHC 2441(Ch)**

Company Voluntary Arrangements ("CVAs") are seen as most unfair by landlords who are often forced to continue to make a supply of premises at an imposed reduced rent.

A group of landlords known as the Combined Property Control Group ("CPC") unsuccessfully challenged the CVA proposed by Debenhams Retail Limited ("Debenhams"). CPC argued that, pursuant to section 6 (1) (b) the Insolvency Act 1986 (the "Act"), the CVA was unfairly prejudicial because it treated landlords less favourably than other unsecured creditors.

Background

A CVA is a legally binding arrangement entered into by a financially distressed company and its creditors. A CVA serves to allow a company to continue trading whilst its liabilities and debts are restructured. CVAs have become increasingly popular as a method of reducing the rental costs that commercial tenants (often retailers) perceive to be onerous. Debenhams' prepack administration was announced 9 April 2019. The company proposed a CVA soon after with the aim of restructuring the company's balance sheet and store portfolio. The CVA was approved at a meeting of creditors on 9 May 2019. On 10 June 2019 CPC launched its legal challenge against the CVA.

Grounds of Challenge & Decision

The challenge was brought on five grounds (detailed below) all of which failed, with the exception of Ground 3.

Ground 1 – under the Act landlords do not constitute 'creditors' in respect of future rent; therefore, they cannot be compromised under a CVA.

This challenge failed. It was held that the Act did provide jurisdiction for landlords to be deemed creditors in respect of future rent. Mr Justice Norris stated that '"future rent is a pecuniary liability (although not a presently provable debt)… whilst the term endures the company is "liable" for the rent, and the fact that in the future the landlord may bring the term to an end by forfeiture does not mean that there is no present "liability"'.

Ground 2 – in reducing the rent payable under a lease the CVA was 'unfairly prejudicial' to landlords.

CPC argued this on two grounds:

i. as a matter of law and basic fairness; and

ii. it is beyond the scope of a CVA to do so.

These challenges also failed. It was held that the CVA was fair because it retained the landlords' freedom to bring an end to the lease if they so wished to. The Court was also of the opinion that because the CVA did not impose any new obligations, but only altered existing ones, it did not act beyond its scope.

Ground 3 – a landlord's right to forfeiture is a proprietary right beyond the scope of the Act and cannot be altered by a CVA.

This challenge was successful. Justice Norris held that pursuant to section 1(2) of The Law of Property Act 1925 a landlord's right to re-enter premises is a proprietary right between a landlord and tenant, not debtor and creditor relationship, and, therefore, cannot be altered by a CVA.

Ground 4 – under CVAs landlords are treated less favourably than other unsecured creditors, without any proper justification. This challenge failed. The court held that there was justification to treat landlords less favourably under CVAs. Justice Norris stated that payment to suppliers in full was justified on the grounds of business continuity, as in this case, a reduction in rent that maintained rent above market value was fair insofar as it allowed other creditors' claims to be paid in full.

Ground 5 – Debenhams' directors gave such inadequate disclosure that the CVA failed to comply with the content requirement of the Insolvency Rules ("IR")

The landlords argued that the CVA failed to comply with rule 2.3 IR because it did not set out the circumstances that could give rise to claw-back claims in the event that Debenhams did go into administration/liquidation. Mr Justice Norris dismissed this challenge on the grounds that it was an irregularity that did not make a material difference to the way in which creditors considered the CVA overall. Goods and services were traded daily on an order-by-order basis. The landlords in question, on the other hand, had been providing accommodation over long terms at above market prices. It was noted that it would be unfair to force landlords to accept rent reductions that took rents below market value. Mr Justice Norris explained that fairness would be judged in the round and not in respect of each individual creditor.

Implications

For Debenhams

Had the challenge been successful Debenhams would most likely have entered administration. Debenhams will now progress its CVA and close a further 22 stores by January 2020. The CVA also allows rent reductions at a further 105 stores. In total, 50 of 166 stores will close.

For landlords

Although the landlords did not achieve their desired outcome overall, the judgment grants them a certain amount of power insofar as it preserves their right to forfeit notwithstanding CVAs purporting to effect the contrary. Provided the clause in the lease is robust, a landlord could use a CVA as justification to exercise a forfeiture clause and take back their property. Equally, landlords will now be on notice that efforts to reduce their rental income below market value will likely be deemed unfair.

For retail tenants

Retailers will be comforted by the ruling as it provides further justification for the contemporary use of CVAs as a means of reducing rental costs. Going forward retailers should note that the court will not allow for re-entry rights to be varied and should not seek to obtain a rent reduction that would take rent to below market rates.

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Court of Appeal pulls the trigger on Town and Village Greens

In the case of *Wiltshire Council v Cooper Estates Strategic Land Ltd* [2019] EWCA Civ 840, the Court of Appeal ("CA") upheld a High Court ruling which overturned the decision of Wiltshire County Council ("the Council") to register a plot of land as a town or village green ("TVG") owing to the fact that a "trigger event" had occurred.

Background

Section 15 of the Commons Act 2006 ("the Act") grants members of the public the right to apply for land to be registered as a TVG. The effect of such a registration is, for practical purposes, to sterilise the land for development. Since 2006 (and the "Trap Grounds" case)[1] the courts have adopted a wide definition of TVG which goes far beyond that which one might expect to constitute a traditional village green: car parks, golf courses and scrubland have all been registered as TVG and, therefore, protected from development. Successive governments grew increasingly concerned that the TVG registration system was being used as a means of stopping developments that might otherwise have been permitted through the planning system.

New legislation

In response, the Act was revised by the Growth and Infrastructure Act 2013, which inserted a new Section 15C into the Act. This new Section 15C prevents a TVG registration where a "trigger event" occurs. Trigger events include situations where a development plan, which has been adopted by a local authority, identifies the land for potential development. Once a trigger event has occurred, the land in question could only ever be registered as a TVG if a "terminating event" were to occur (see Section 15C(2) of the Act). Terminating events include situations where a development plan ceases to have effect or is revoked, or a relevant policy is superseded.

Facts of the case

In *Wiltshire Council v Cooper Estates*, an application was made to the Council by an interested third party to register a small triangular plot of land (totalling 380 square metres) ("the Land") within the settlement boundary of Royal Wootton Bassett as a TVG.

Cooper Estates, the owner of the Land, objected to the application and argued that as the Land had been identified for potential development in the Wiltshire Core Strategy, a trigger event had occurred.

The Wiltshire Core Strategy was adopted by the Council in 2015 and two of its key policies include:

- Core Policy 1 ("CP1") which is the settlement strategy identifying settlements, one of which is Royal Wootton Bassett, where sustainable development would take place; and
- Core Policy 2 ("CP2") which provides that within those settlements there is a presumption in favour of sustainable development.

The Council considered that the provisions of the Wiltshire Core Strategy were not enough to satisfy the definition of a trigger event and the Land was therefore registered as a TVG.

[1] Oxfordshire County Council (Respondents) v Oxford City Council (Appellants) and another (Respondent) (2005) and others [2006] UKHL 25

In the High Court

Cooper Estates successfully challenged the Council's decision in the Administrative Court. The judge found that a trigger event had occurred, stating "*the Core Strategy through CP1 and CP2 identifies an area of land which includes the Land (i.e. the boundary of Royal Wootton Bassett) and identifies it for potential development by creating a presumption in favour of development within the settlement boundary.*"

In the Court of Appeal

The key issue on appeal was whether the Land had been sufficiently identified in a development plan document for potential development. In support of the High Court's decision, the CA found as follows:

- Identification: it was not a requirement for the Land to be specifically identified for development. It was sufficient for it to be included as part of a larger area identified in a development plan.
- Potential development: CP1 and CP2 resulted in the Land being identified as having the potential for development, and this was sufficient to constitute a trigger event. It was incorrect to adopt a restricted approach whereby the trigger event would only arise where the Land had been specifically identified for development. It was not the role of the Council to consider whether planning permission would ever be granted in respect of the Land, just whether there existed the potential for development, which in this case there was.

With regard to the issue of potential development, the Court did not rule out the possibility that in certain cases, development plans could indicate that a specific parcel of land would not be developable and therefore not result in a trigger event. Equally, the CA highlighted that where a trigger event had occurred, and the absolute protection against development in consequence of registration as a TVG is removed, it would not necessarily lead to the consequence that the land will be developed.

The CA held that allowing a TVG registration in the present case would frustrate the objectives of the development plan and be contrary to the intentions of government policy and the new legislation. The TVG registration was therefore successfully overturned.

Comment

This case will come as good news for developers who may wish to object to the registration of land as a TVG. The CA has resolved previous ambiguities as to what constitutes a trigger event by adopting a wide interpretation. As such, if land is identified in a development plan document as having the potential for development, regardless of the prospects of obtaining planning permission for any development, it is likely that a trigger event would have occurred, thereby blocking registration of the land as a TVG.

The judgment clearly indicates that the protection of a piece of recreational land with identified development potential should instead be achieved through the planning system and not by means of registration as a TVG. The identification and protection of green recreational land can be realised through the planning process by the designation of land as Local Green Space[2] in development plan documents, which are themselves the subject of extensive public consultation and involvement.

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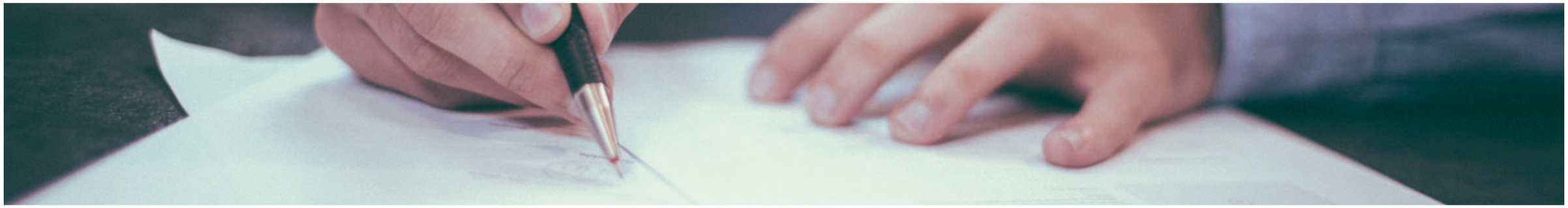
[2] See Paragraph 99 of the National Planning Policy Framework (2019)



Contracting out of security of tenure – Can tenants have their cake and eat it too?

The recent High Court decision in *TFS Stores Limited v BMG (Ashford) Limited et al* [2019] EWHC 1363 (Ch) is an important decision dealing with the contracting out procedures under Section 38A of the Landlord and Tenant Act 1954 (1954 Act) and Schedule2 of the Regulatory Reform (Business Tenancies) Order 2003 (2003 Order).

Background and facts

The Fragrance Shop (TFS), a large perfume retail operator with over 200 stores nationally, entered into leases at six designer retail outlet centres and in each case the contracting out procedure was followed. Following the expiry of the leases, and the landlord's decision not to renew but to let the stores to a rival perfume retailer, TFS sought to establish that the six leases were protected by the 1954 Act.

The contracting out procedure

Unless a commercial lease is contracted out, the 1954 Act serves to protect the tenant's right to remain in occupation of the premises and its right to the grant of a new lease following the expiry of its existing lease.

The parties can agree that this protection is waived prior to the grant of a lease provided the following steps are taken:

1. The landlord serves a warning notice explaining the tenant's rights that are being waived;

2. The tenant makes a declaration to acknowledge that it understands the consequences of contracting out; and

3. The lease includes an endorsement referring to the landlord's notice and the tenant's declaration and the parties' agreement that the relevant provisions of the 1954 Act are to be excluded from the lease.

Issues raised by TFS

The court firstly considered arguments concerning the alleged absence of authority of the tenant's solicitor and the tenant's retail director, as agents, to receive the warning notices and/or to make the declarations and secondly, the alleged defective wording in the statutory declarations due to the failure to include a fixed date for the grant of the lease.

The court considered the law of express and implied actual authority, ostensible authority and the imputation of knowledge via an agent, in order to answer the following two questions:

1. Did the tenant's solicitors have authority to receive the warning notices as the tenant's agent?

2. Did the person who made the declaration in each case have the authority to do so?

The judge held that the tenant's solicitors had actual authority to accept service of the warning notices on the basis that this formed part of their instructions to complete the transaction in accordance with the terms agreed between the parties, which included the leases being contracted out.

Where the tenant's retail director had made the declarations, the tenant argued that this was invalid because he was not a statutory director of the company. The court held that the tenant was bound by the acts of professional and employee agents as having actual authority to act as they did, meaning that the tenant was unable to challenge the validity for lack of authority by the person making the declarations.

Another argument put forward by the tenant was that the statutory declarations were invalid due to a failure to include the exact term commencement date of the leases. As the term commencement date was not known at the time of drafting the notices, wording was used to circumvent using an exact date, such as "the term of the lease to be granted would begin on the access date determined under the agreement for lease between the parties" or "for a term commencing on the date on which the tenancy is granted".

The judge held that an exact term commencement date was not essential because the purpose of the wording is to identify the tenancy to be granted and the wording used was sufficient for those purposes.

The court also confirmed that statutory declarations must be made "in the form, or substantially in the form" set out in the 2003 Order. The declarations could therefore be rescued by virtue of them being in "substantially" the form contained within the 2003 Order.

Implications

Ultimately, the court found that the leases were validly contracted out.

The approach taken by the court in this case will be a relief to landlords and their lawyers as it confirms the validity of current market practice. Had the court reached a different conclusion, this could have caused practitioners significant difficulties, particularly in relation to specifying a future date in the warning notice where the term commencement date is not known in advance.

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Overage - How reasonably hard does a developer have to work to make himself liable?

In a previous edition of the Bulletin (June 2018), we discussed the case of *Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd* in which the court considered whether a developer had used 'reasonable endeavours' to achieve 'as soon as reasonably practicable' the satisfaction of certain conditions which would trigger liability to make an overage payment. The Court of Appeal has now considered the matter and upheld the decision at first instance.

***(Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd* [2019] EWCA Civ823)**

Background

In May 2003, Abbeygate acquired the superior lease of a leisure complex in Milton Keynes with a view to developing the site. In order to develop the site, Abbeygate would need to: 1) acquire the freehold of the site or alter the superior lease to permit redevelopment; and 2) acquire all underleases, including the leases of the ice rink.

In July 2003, the tenant of the ice rink, Planet, transferred its leases to Abbeygate. The agreement provided for Abbeygate to make an overage payment to Planet in the sum of £1.4 million once 'an Acceptable Planning Permission' had been granted, provided the trigger date for payment occurred by 4 July 2013. The payment was also conditional upon Abbeygate successfully varying the "registered leases" and superior lease so as to permit the redevelopment or otherwise acquiring/merging those interests as part of the development process (clause 3.1).

Abbeygate covenanted to "use its reasonable endeavours to obtain an Acceptable Planning Permission". It also covenanted that it would "as soon as it considers strategically advisable (taking into account the requirement to obtain an Acceptable Planning Permission) commence and thereafter use reasonable endeavours to negotiate and agree with the parties entitled to the reversions … the variations contemplated by [the condition] as soon as reasonably practicable" (clause 3.3).

Abbeygate entered into a number of conditional agreements in respect of the site but retained considerable influence over when and in what order those conditions would be satisfied. As a result of the complexity of the arrangements and associated timescales, the conditions triggering the payment obligation were only satisfied four days after the expiry of the 10 year longstop date provided for in the overage provision.

Gaia, which had acquired the benefit of the overage provision from Planet, sought damages contending that Abbeygate had "failed to use reasonable endeavours" to satisfy the conditions for payment of the overage.

First instance decision

At first instance, Mr Justice Norris upheld Gaia's claim and found that Abbeygate did not approach matters with a desire to take steps "as soon as reasonably practicable" but rather to delay matters and adopt a timetable which would not only enable it to secure the funding for the development but also avoid the overage payment.

He held that Abbeygate did not make reasonable endeavours to achieve as soon as reasonably practicable the necessary variation of the property interests. If it had done so, the trigger date would have occurred at a time which would have entitled Gaia to claim the overage payment. Accordingly, Abbeygate was in breach of its obligations and Gaia was entitled to damages in the sum of GBP 1.4 million.

Court of Appeal decision

Abbeygate appealed the first instance decision upon a number of grounds but its principal argument was that it was entitled to have regard to its own commercial interests when deciding what steps it should take to satisfy the clause 3.1 conditions.

The first instance judge had relied upon an earlier case which made clear that questions of profitability are ordinarily to be left out of account in determining what it is reasonable for a developer to do. The Court of Appeal felt that this was to state the matter too broadly. However, it was not necessary for the Court of Appeal to ultimately express a view on this because the restriction on funding was self-imposed and it was therefore open to the first instance judge to conclude that, even if access to funding would be a relevant consideration, Abbeygate could not rely on that to show that it had used "reasonable endeavours" to satisfy the clause 3.1 conditions as soon as reasonably practicable.

The judge had found that the timetable had been manipulated to take the satisfaction of the necessary conditions in the third party agreements beyond 4 July 2013 and that, on any view, was a breach of clause 3.3. Consequently, Abbeygate's appeal was dismissed.

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When should a judgment be set aside for fraud?

***Takhar (Appellant) v Gracefield Developments Limited and others* (Respondents) [2019] UKSC 13**

Background Facts

This case concerns Balber Kaur Takhar (the Appellant) and her cousin Parkash Kaur Krishan (the third Respondent) who, having not seen each other for many years, became reacquainted in 2004. During this time, Mrs Takhar was suffering personal and financial problems, having separated from her husband five years previously. Mrs Takhar had acquired a number of properties in Coventry as part of the arrangements with her former husband. Financial problems arose from the dilapidated condition of some of the properties and, in 2005, it was agreed between Mrs Takhar and the Krishans that legal title to the properties would be transferred to a newly formed company Gracefield Developments Limited, of which Mrs Takhar and the Krishans were directors and shareholders.

Mrs Takhar claimed that it had been agreed that the properties would be renovated and then let. The rent would be used to fund the cost of the renovations, which until that point would be subsidised by the Krishans. Mrs Takhar was also to remain the sole owner of the properties. The Krishans, however, claimed that Gracefield was established as a joint venture, that the properties were to be sold upon renovation and that Mrs Takhar was to be paid an agreed sum after they were sold. Any additional profit was to be divided equally between Mrs Takhar and the Krishans.

In October 2008, Mrs Takhar issued proceedings for a declaration as to the ownership of the properties and claimed the properties had been transferred to Gracefield as a result of undue influence or other unconscionable conduct. The Krishans presented a profit share agreement (PSA), allegedly signed by Mrs Takhar, to prove her agreement to their terms. Mrs Takhar had applied before the trial for permission to obtain evidence from a handwriting expert who had produced a report stating that the expert could not say that the signature on the PSA was that of Mrs Takhar. Permission was refused. At the trial, Judge Purle QC held that the properties had been transferred legally and in accordance with the oral agreement made between the parties.

Following the trial, Mrs Takhar instructed new solicitors who consulted another handwriting expert who conclusively stated that the signature on the PSA had been transposed from a letter sent to the Krishans' solicitors in 2006. Mrs Takhar was advised that she had enough evidence to plead fraud against the Krishans. Mrs Takhar could not have pleaded fraud until she had received the second expert's handwriting report. Mrs Takhar applied to the court to set aside Judge Purle's judgment and order. The Krishans claimed that this was an abuse of process as the documentation was available to the first set of solicitors and they could therefore have pleaded fraud. The court ordered that the question whether Mrs Takhar's claim amounted to an abuse of process be tried as a preliminary issue. That trial took place before Newey J in February 2015. In his judgment Newey J held that a party who seeks to set aside a judgment on the basis that it was obtained by fraud does not have to demonstrate that he could not have discovered the fraud by the exercise of reasonable diligence. The present claim was therefore not an abuse of process. The Krishans appealed to the Court of Appeal who allowed the appeal. Mrs Takhar appealed to the Supreme Court.

Judgment

The question posed to the Supreme Court was whether someone who applies to have an earlier judgment set aside because it was obtained by fraud is required to show that the evidence of fraud could not have been uncovered at the earlier trial via reasonable diligence (the 'reasonable diligence requirement'). The bench of seven judges held that there was no 'reasonable diligence requirement' necessary to set aside a previous judgment obtained through fraud.

Lord Kerr noted that a fraudulent person should not profit because their opponent did not act with reasonable diligence. A person who has obtained a judgment through fraud has enacted a deception on their opponent, the court and the rule of law. To think otherwise would be contrary to justice.

Lord Sumption agreed and argued that it was not folly for a reasonable person to assume honesty in those he/she dealt with in legal proceedings.

Conclusion

Takhar v Gracefield allows one to engage with a friction point in the law that is at the core of how we arrive at justice: whether the law ought to require reasonable due diligence to go forward with the reassessment of a judgment obtained through fraudulent deception. While from a procedural point of view, reassessing a judgment may appear to be an abuse of process, the court should do its utmost to arm itself against fraud even if it comes at the cost of re-litigation. While it does not apply to Mrs Takhar's case, it is worth considering whether parties might intentionally avoid exercising reasonable diligence in their initial dealings with their opponent(s) and claim fraud later on in proceedings. This is where one might argue that in order to avoid the needless waste of resources and discourage foul play, the unsuccessful party in a judgment must be obliged to provide a full explanation as to how the judgment was obtained via fraud to avoid needless reassessment of facts, for example.

Lord Sumption raised a contentious point in the judgment of this case. Namely, that it wasn't unreasonable for one to assume honesty in one's opponent. This notion came across as rather idealistic. Perhaps in an external transaction out of court one could reasonably expect honesty but it seems farfetched for a litigant to necessarily assume honesty and good faith from a legal opponent. While a clear modus operandi concerning dealing with claims of fraud moving forward is still up for debate, an assessment of *Takhar v Gracefield* allows us to contemplate not only the kind of evidence we should demand to reconsider judgments, but what that process should look like if we decide to.

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Court of Appeal upholds order for rectification

***Persimmon Homes Ltd v (1) Anthony John Hillier (2) Colin Michael Creed* [2019] EWCA Civ 800**

Background

Persimmon Homes Limited (the "Buyer") is a major housebuilder which holds significant amounts of land for future development. Mr Hillier and Mr Creed (the "Sellers") had for many years run a successful housebuilding business operating mainly in Kent and Sussex. In October 2012, the Buyer sought to acquire from the Sellers six parcels of land making up a development site.

By way of a share purchase agreement dated 5 October 2012 (the "SPA"), the Buyer purchased all of the shares in two of the Sellers' companies (the "Targets"). Through its purchase of the Targets, the Buyer acquired options to purchase four of the six parcels of land. The other two parcels (the "Felbridge freeholds"), which were necessary for access to the entire development site, fell under a different chain of ownership outside of the Targets and as such were not transferred to the Buyer.

The SPA contained a definition of 'properties' held by the Targets which described the location of the land but stopped short of identifying any specific parcels. The SPA contained warranties that the Targets had good title to the properties. An accompanying disclosure letter sent by the Sellers during the negotiations qualified the warranties, by stating that the Targets did not own the Felbridge freeholds.

High Court

The Buyer applied to the High Court seeking rectification of the SPA and disclosure letter so as to reflect what it claimed was the common intention of the negotiated deal between the parties: that the transaction would result in the Buyer acquiring the entire development site (i.e. all six parcels of land).

The judge found that the heads of terms agreed between the parties were contrary to the inclusion of the Felbridge freeholds in the transaction. That being said, the judge held that the Sellers' communications indicated that they controlled the entire development site and that a consequence of acquiring the Targets would be that the Buyers gained the interests in the entire site, including the Felbridge freeholds. The judge found this to have been the common intention between the parties, and ordered that the SPA and disclosure letter be rectified to reflect that intention.

This resulted in the description of 'properties' owned by the Targets in the SPA being rectified to so as to include the Felbridge freeholds along with the other four parcels. The disclosure letter was rectified to remove the qualification that the Felbridge freeholds were not owned by the Targets. Consequently, the judge found that the Sellers were in breach of the warranties in the SPA and were liable to pay damages to the Buyer.

Court of Appeal

The Sellers appealed the High Court's decision on two grounds:

1. Was the decision to order rectification supported by the evidence before the judge?

2. Was a disclosure letter capable of being rectified as a matter of law?

On the first ground, the Court of Appeal found that the judge had been entitled to conclude that the SPA and disclosure letter did not accurately record the terms of the agreement between the parties and that the requirements for rectification had been satisfied.

The fact that the heads of terms reflected a different position to the SPA was not relevant, as the heads of terms did not have contractual force and were to be considered as part of the negotiations leading to the SPA, rather than as part of the agreement itself.

The court rejected the Sellers' argument that a sophisticated and commercially aware entity such as the Buyer would have known that if it acquired the Targets it would only acquire the assets owned by the Targets which did not include the Felbridge freeholds. It was held that the Sellers, as controlling shareholders of all of the companies owning the six parcels of land, were responsible for ensuring that the Felbridge freeholds were transferred into the ownership of the Targets before the completion of the transaction.

On the second ground, the Sellers argued that the disclosure letter was a unilateral document stating a particular set of facts existing at the time and it would therefore be improper to rectify it so as to re-write history. The court found that the disclosure letter was an integral part of the suite of documents designed to give effect to the parties' intended transaction. It did not fulfil this role, and there was accordingly no reason why it should not be capable of rectification, irrespective of it being a unilateral document. Rectification was not re-writing history but simply giving effect to the parties' intended transaction.

The Buyers' claim was therefore upheld, and the Sellers were liable to pay damages representing the difference between the development site's actual market value at the time of the transaction and the value it would have had had the intention of the parties been given effect to.

Comment

Although the Buyer was successful, this case illustrates the importance of undertaking a thorough due diligence exercise before completing on purchases of land. Buyers need to be sure of exactly what it is they will be purchasing.

The case also serves as a reminder of the importance of instructing experienced advisors to carefully draft and review the documents intended to give effect to the agreement, and to ensure the precise nature of the agreement is explicitly recorded.

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Section 21 Notices to be abolished – Disaster for Landlords?

In what has been described as the biggest potential change to the private rental sector for a generation, the government is holding a consultation on its proposals to abolish section 21 notices.

Current position

Section 21 notices, otherwise known as "no-fault" evictions, enable landlords to terminate Assured Shorthold Tenancies ("ASTs") on or after the end of a fixed term by giving at least two months' written notice before obtaining a court order for possession if the tenant does not vacate in accordance with the notice. Crucially, there is no requirement for the landlord to provide any reasons for it requiring possession.

The alternative option currently available to landlords is to terminate the AST during (or after) the fixed term by serving a Section 8 notice as a precursor to obtaining a possession order if necessary. However, the landlord must be able to rely upon one of the statutory grounds when using the section 8 procedure and so the procedure is generally only used when the tenant is at fault (for example, if there are rent arrears). It is generally considered to be a riskier process for landlords and is often more costly.

Why change?

The proposals are part of the government's wider package to tackle the housing crisis, increase tenant security and balance the bargaining power between tenants and landlords.

New proposals

Under the new proposals, the government proposes to put an end to "no-fault" evictions by repealing section 21 of the Housing Act 1988 – going forward, a landlord would not be able to evict a tenant without good reason. Landlords would continue to have the ability to evict tenants (by serving a section 8 notice) where the tenant breaches the AST terms, where rent is in arrears or where the landlord plans to sell the property or live in the property itself. The proposals do not, however, provide a platform for the landlord to terminate the tenancy for purely commercial reasons – usually because, if it wishes to rent to another tenant for an increased rent.

However, rent reviews will continue to be allowed annually, restricted only by the opportunity for the tenant to challenge the new rent should they not agree that it reflects market value. Therefore, landlords should be able to ensure that they are receiving the market rate for their properties.

The government has suggested expediting the court process to allow repossession of property in the event that the tenant is in rent arrears or has damaged the property. However, in the light of the very poor current resourcing of the court system, this seems somewhat aspirational and proposals to "digitise the court process" and "provide better guidance" do not provide much comfort.

Disaster for Landlords?

Whilst the proposals are purposely favourable to tenants, it remains to be seen whether they would substantially affect a tenant's position in reality.

The National Landlords Association has criticised the proposals as effectively creating indefinite tenancies. However, by using the example of Scotland (where the same proposals were implemented in 2017), it is foreseeable that landlords will seek to mitigate this risk by exercising their right to review rent annually – thereby ensuring that they continue to receive the market rate. This may lead to greater numbers of tenants ending their occupation and, in effect, keep the market functioning.

However, where a landlord is faced with the potential of an indefinite tenancy, it is far less likely to take on a tenant who it perceives as "risky". It is therefore likely that tenants will face increased scrutiny during the due diligence process and landlords will perhaps seek lengthier and stricter guarantees.

The consultation closed on 12 October 2019 and its outcome is awaited.

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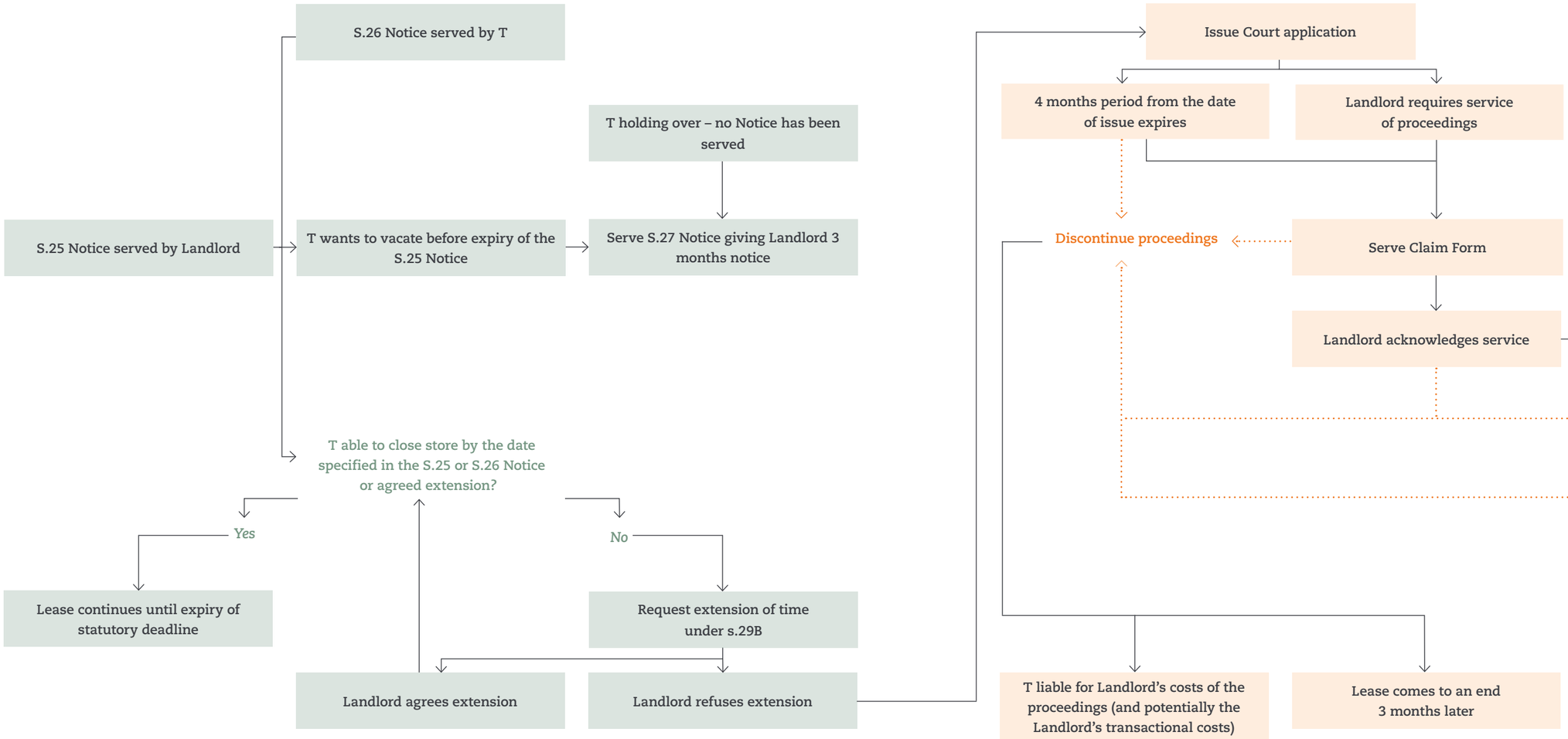
1954 Act protected leases



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